IN THE

Supreme Court of the United States

October Term, 1982

No. _____

JEWEL WEST A/k/a
JEWELL A. WEST, Petitioner

vs.

LEE ROY WEST, Respondent

PETITION FOR A WRIT OF CERTIORARI
to
THE SUPREME COURT OF THE UNITED STATES

APPENDIX

I, the undersigned Deputy Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the attachments hereto are a complete roll of all orders, judgments and decisions in case No. 55,153, Temporary Court of Appeals Division No. 63, State of Oklahoma and Supreme Court of the State of Oklahoma, same being styled JEWEL WEST a/k/a JEWELL A. WEST, Appellant vs. LEE ROY WEST, Appellee, and that said documents attached, are, as noted thereon, true and correct copies of all such documents. Dated this 20th day of December, 1982.

ROSS N. LILLARD, JR.
Clerk of the Supreme Court
State of Oklahoma

BY: /s/ Carrie L. Sites
Deputy Clerk

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IN THE SUPREME COURT IN AND FOR THE STATE OF OKLAHOMA

No. 55153

JEWEL WEST a/k/a
JEWELL A. WEST, Appellant,

vs.

LEE ROY WEST, Appellee

PETITION IN ERROR

Comes now the Appellant, JEWEL WEST a/k/a JEWELL A. WEST, Defendant in the trial court case named hereinbelow, and asks this Court to find in error the ruling of the trial court in favor of the Appellee, LEE ROY WEST, Plaintiff in the trial court case named hereinbelow, in support of which Appellant alleges and states:

1. That the original trial court was the District Court of Osage County, Pawhuska, Oklahoma;
2. That in that court this matter was styled LEE ROY WEST, Plaintiff versus JEWEL WEST a/k/a JEWELL A. WEST, Defendant, and given the case number JFD-79-17;
3. That the case arose upon Plaintiff's (Appellee) filing of a petition asking the Court to grant a divorce from Defendant (Appellant) on January 16, 1979; that on January 19, 1979, Plaintiff (Appellee) filed an affidavit asking that the Defendant (Appellant) be served by

publication; that on January 27, 1979, Plaintiff (Appellee) received a letter from Defendant (Appellant) stating her address; that Defendant (Appellant) attempted again to contact Plaintiff (Appellee) by certified mail on February 2, 1979, but that in spite of knowledge of Defendant's (Appellant) address Plaintiff (Appellee) had already begun notice by publication; that on February 9, 1979, Defendant (Appellant) contacted Plaintiff (Appellee) by telephone and was told that he had filed for divorce, that it would take a long time and that she would be hearing from him; that on March 7, 1979, in spite of the fact that Plaintiff (Appellee) knew where Defendant (Appellant) could be contacted and knowing she had never seen a copy of the pleading though she was led to believe she would see same, a decree of divorce was taken; that the decree as ordered gave custody of the child of the parties to the Plaintiff (Appellee) without visitation rights by the mother Defendant (Appellant) and gave all furniture, fixtures, real property, livestock, vehicles and bank accounts to Plaintiff (Appellee) leaving Defendant (Appellant) only those items of personal property in her possession.

4. That on April 16, 1979, a Motion to Vacate Judgment of Decree of Divorce was filed in behalf of Appellant; on May 21, 1979, Appellant filed an Amended Motion to Vacate along with a Brief in Support; on December 3, 1979, Appellant filed a Motion for Default for Failure of the Plaintiff to File Brief; on December 12, 1979, Appellee filed a Brief; on January 25, 1980, Appellant filed a Response Brief; that on the 2nd day of April, 1980, the Honorable Mermon H. Potter, Associate District Judge, Osage County, Oklahoma, made a Findings of

Fact and conclusions of law allowing the decree to stand as ordered, which decision Appellant now requests be reversed.

5. That, as Appellant will more fully explain in her brief to be filed herein, the Appellee could not avail himself of notice by publication when he knew the address where the Appellant could be served by certified mail; further that knowing Appellant's address, Appellee should have attempted service by certified mail prior to publication; that instead Appellee lulled the Appellant into complacency until the required answer date had passed and Appellant was in default in order to obtain a divorce decree which was lopsided in Appellee's favor; that the original findings of fact and conclusions of law in the decree of divorce were not sufficient under the standards enunciated in District Court Rule No. 16 requiring a recitation that primary and secondary sources of locating a Defendant must be stated to have been used prior to allowing a publication notice default to stand; that Appellee did not comply with the requirements of 12 O.S., §§170.6, 170.7, 173, 174 and the edicts of the cases of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, *Bomford v. Socony Mobile Oil Co.* 440 P.2d 713, *Copas v. Reents*, 365 P.2d 983, among others requiring due diligence in notifying a Defendant of an action pending prior to utilizing notice by publication; that under the constitutions of both the United States of America and the State of Oklahoma, Appellant has been denied procedural due process of the law.

6. That Appellant seeks the original divorce decree reversed, remanded and instructions to be given the trial court that

both sides be allowed to present their evidence; further that as required by 12 O.S. § § 1275 and 1278 a division of the property be had in a "just and reasonable manner"; that as required under 12 O.S., § 1275, custody of the minor child of the parties be made in a "proper manner"; finally that the Appellant be allowed to file an Answer and Cross-Petition in the case allowing her to be on equal footing with the Appellee.

7. That counsel for Appellee, LEE ROY WEST, is Mr. W. ROBERT WILSON, KANE, KANE, WILSON & MATTINGLY, whose mailing address is P. O. Box 1019, Pawhuska, Oklahoma 74056 and whose telephone number is (918) 287-3143.

Attorneys for Appellant
HESKETT, HESKETT, DANIEL & ESSER

BY: _____

Rick Esser
337 Price Tower
Bartlesville, Oklahoma 74003
(918) 336-1773

CERTIFICATE OF FILING WITH TRIAL COURT AND OF MAILING

I, the undersigned, do hereby certify that a copy of the

petition in error was filed in the trial court and a copy mailed to counsel of record:

W. Robert Wilson
KANE, KANE, WILSON & MATTINGLY
Attorneys at Law
P. O. Box 1019
Pawhuska, Oklahoma 74056

with postage prepaid.

_____

Rick Esser

IN THE DISTRICT COURT OF OSAGE COUNTY, OKLAHOMA

Lee Roy West,	)	
Plaintiff,	)	
vs.	)	No. JFD-79-17
Jewel West, a/k/a Jewell A. West,	)	
Defendant.	)	

DECREE OF DIVORCE

Now on this 7th day of March, 1979, the above entitled matter comes on for hearing pursuant to regular assignment, the plaintiff appearing in court in person and by and through his attorneys of record, Kane, Kane, Wilson & Mattingly by W. Robert Wilson, and the defendant having been called three times in open court appears not.

Plaintiff then announced ready and this matter proceeded to trial.

Thereupon, the court duly examined all files and records on file herein and after hearing the evidence of the plaintiff given in open court and the statement of counsel, makes the following findings, to-wit:

The court finds that the plaintiff was at the time of the filing of his petition herein and had been for a period of time exceeding one year a good faith resident of Osage County, Oklahoma, and that this court has full jurisdiction over this matter and the parties hereto.

The court finds that the defendant herein was duly served with summons and notice of this suit by publication in the manner and form prescribed by law and in connection therewith, the court having examined the verified Affidavit

To Obtain Service By Publication by the plaintiff as filed in this case on January 16, 1979, and hearing the evidence given in open court finds that pursuant to said affidavit, notice by publication of this suit was given to the defendant and after having duly examined said notice by publication and the proof of publication as filed herein and having conducted fully a judicial inquiry into the sufficiency of the said plaintiff's search to determine the whereabouts of the said defendant who was served herein by publication, the court, based upon its judicial inquiry and based upon the matters set forth in the verified Affidavit and the testimony given in open court by said plaintiff finds that the plaintiff had exercised due diligence and conducted a meaningful search of all reasonably available sources at hand to locate said defendant so that she could be served personally but that he was unable to locate her or determine her whereabouts at the time the Affidavit was filed and the notice published as required by law, by reason of which he was unable to obtain personal service of summons upon her and the court after such judicial inquiry approves the publication service as given herein as meeting both statutory requirements and the minimum standards of state and federal due process of law.

The court further finds that based upon the evidence given in open court that the defendant herein did on or about the 18th day of August, 1978, remove herself from the home of the parties hereto without any advance notice to the plaintiff or the minor child of the parties hereto and that since said date the plaintiff has not known her actual whereabouts or location other than the fact that he was aware that she may have been in the State of California. The court further finds based upon plaintiff's Exhibit 1 as introduced in this court that the said defendant did on February 5, 1979, write a letter to the plaintiff advising the plaintiff that she was aware

of the notice by publication which had been previously published in accordance with the provisions of law and that she had made contact with a law firm in Pawhuska for the purpose of representing her and advising her but that said defendant had made no appearance or filed any pleadings in this action nor had the court been contacted by any attorneys representing said defendant or had any pleading been filed by any attorneys representing said defendant and further, based upon the statement of plaintiff's counsel made in open court that the counsel for plaintiff had not been contacted by the defendant or contacted by any attorney or any other person purporting to represent the said defendant.

The court further finds that the parties hereto were married on September 28, 1962 in Bartlesville, Washington County, Oklahoma, and that of said marriage, one child has been born, namely, Boyd Baron West, he having been born on September 9, 1964.

The court finds that based upon the evidence introduced in open court that by reason of the acts of said defendant that she has created a state of incompatibility and has grossly neglected her duties towards said marriage and that she has abandoned said plaintiff and the minor child of said parties for a period of time in excess of six months and by reason thereof a state of complete and irreconcilable incompatibility has arisen between the parties which has completely destroyed the legitimate aims of said marriage and that the plaintiff is entitled to a decree of divorce of and from the defendant.

The court further finds that the plaintiff is a fit and proper person to have the care, custody and control of the minor child of the parties hereto, to-wit: Boyd Baron West, and that the permanent care, custody and control of said child is vested in the plaintiff and that if the defendant has any desire

to have visitation rights with said child, that said defendant shall make application with this court and the court shall at that time take under consideration visitation rights by said defendant with the minor child of the parties hereto.

The court further finds that during the course of said marriage the parties have accumulated certain property and the court finds that as to said property the same should be set aside to the parties and disposed of as follows:

a. The defendant should be awarded all of her personal clothing and personal effects and in this connection, the court finds based upon the evidence that at the time the said defendant abandoned said plaintiff she took with her the majority of all of her personal clothing and effects but that if any of said personal clothing and personal effects still remain in the residential home of the parties which is now occupied by plaintiff, that said personal clothing and personal effects are awarded to said defendant.

b. That the plaintiff is awarded all furniture, fixtures, appliances and other personal property located within the residential home of the parties hereto and further is awarded the residential home of the parties which is located upon real estate hereinafter distributed by this court.

c. The court further finds that the plaintiff is the owner of certain livestock and that all livestock is awarded to him subject to all indebtedness thereon which he shall pay.

d. The court further finds that the plaintiff is in the possession of a pickup truck and automobile and that both of said vehicles are awarded to the plaintiff subject to any indebtedness which might be due and owing thereon.

e. The court further finds that the plaintiff is awarded all other personal property of every kind and character now in

the possession of the plaintiff or located on or used in connection with the lands or ranch operations of the plaintiff.

f. Plaintiff is awarded all of his personal clothing and personal effects as well as title to any and all bank accounts and money on deposit therein.

The court further finds that with regard to property accumulated by said parties that on July 1, 1967, a general warranty deed was executed whereby title to certain property as hereinafter described was vested in Ed E. West, father, Lee Roy West, son, and Jewel West, wife of Lee Roy West, title to said property being vested in all of them as joint tenants with the right of survivorship. In connection with this, the court finds upon the evidence introduced in open court, that said property was purchased by the plaintiff and by his father, Ed E. West, and that said parties paid the purchase money thereof and that the defendant contributed no purchase money to the acquisition of said property or to the purchase price as paid by said parties and that said property has been treated and considered by said parties as belonging to the plaintiff, Lee Roy west, and to his father, Ed E. West. The court finds that any interest which the defendant may have in and to said property either present or remainder interest, is hereby vested in the plaintiff, Lee Roy west and that said defendant shall within ten days of the date of this decree execute a quit claim deed conveying all of her interest in and to said property to the plaintiff and in the event she fails or refuses to execute and deliver said deed that this decree shall serve as a conveyance from the defendant to the plaintiff of all of said defendant's interest in and to said property as hereinafter described whether the same be a present and vested interest or a remainder interest.

The court further finds that there is on deposit with Sooner Federal Savings & Loan Association of Tulsa, Oklahoma, a Savings Certificate No. SC8700104-1 in the principal amount of $20,000.00, said savings certificate standing in the name of Lee R. West and/or Jewell A. West as co-trustees with the right of survivorship for Boyd B. West. In this connection the court finds that said savings certificate and all funds on deposit therein was created by the parties to this action for the benefit of their minor son, Boyd B. West, and that said savings certificate should be vested solely in the name of the plaintiff, Lee R. West, as trustee for Boyd B. West, minor child of the parties, and that the defendant shall have no further rights whatsoever in or to said certificate. In this connection the court finds that a copy of this order shall be delivered to Sooner Federal Savings & Loan Association of Tulsa, Oklahoma and upon receipt thereof they shall make the proper changes in said certificate showing that the same stands vested solely in the name of the plaintiff, Lee R. West as sole trustee for the use and benefit of Boyd B. West and that the defendant has no further rights or claims whatsoever in or to said certificate.

The court further finds that during the course of said marriage and in particular within the last four years thereof the plaintiff has given to the defendant the sum of $3,070.00 which based upon the evidence given in open court has been placed in a savings account in the name of the defendant alone and the court finds that said funds or such funds as may be left are hereby set apart and awarded to the defendant as her sole and separate property.

The court further finds that the defendant is denied any alimony.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by this court that the plaintiff be and he

hereby is granted a decree of divorce of and from the defendant on the grounds of incompatibility and based upon the facts heretofore set forth by this court in its findings, provided, however, that this portion of the decree shall not become final until the expiration of six months from the date hereof during which time the parties hereto shall be and they are hereby prohibited and enjoined from marrying any other person.

IT IS FURTHER ORDERED that the sole care, custody and control of the minor child of the parties hereto, to-wit: Boyd Baron West, be and he hereby is placed with the plaintiff and that if the defendant desires any rights of visitation with said minor child, that she shall make application to this court and upon proper application being made the court shall give consideration granting to said defendant rights of visitation as the court may deem proper.

IT IS FURTHER ORDERED that of the properties accumulated by the parties during said marriage that the same shall be disposed of and awarded to the parties in the following manner, to-wit:

Defendant shall be awarded the following:

a. All of her personal clothing and personal effects.

b. All funds in her possession or deposited in bank accounts to her name alone which are either now in her possession or under her control.

Plaintiff shall be awarded the following:

a. All of his personal clothing and personal effects and all household furniture, appliances and fixtures and all other personal property now located in the residential home of the parties.

b. The pickup truck, automobile and all other items of personal property including all farming and ranching

equipment and all other items of personalty located on or used in connection with the farming and ranching operations of said plaintiff and located on lands belonging to said plaintiff or under his control.

c. All livestock subject to any and all indebtedness thereon.

d. Plaintiff is awarded full title to all interest of the defendant whether vested or remainder interest in and to the following described real estate, to-wit:

SW/4 NW/4 and W/2 SW/4 of Section 32; Lot 4 and S/2 SE/4 SW/4 and SE/4 and E/2 W/2 E/2 SE/4 NE/4 and E/2 E/2 SE/4 NE/4 and NW/4 NW/4 NE/4 SE/4 NE/4 and SE/4 NE/4 NE/4 and S/2 NE/4 NE/4 NE/4 and S/2 S/2 S/2 SW/4 NE/4 and NE diagonal 1/2 of SW/4 NW/4 NE/4 SE/4 NE/4 of Section 31, all in Township 24 North, Range 11 East, Osage County, Oklahoma, together with all improvements located thereon and less and except all oil, coal, gas and other minerals lying in and under said lands which are reserved to and owned by the Osage Tribe of Indians.

IT IS FURTHER ORDERED that the defendant shall within a period of ten days from the date of this decree, execute and deliver to the plaintiff a quit claim deed conveying all of her interest in and to the above described real estate together with improvements located thereon and in the event of her failure to execute and deliver such deed, then this decree shall serve as a conveyance of all of the defendant's interest, whether present, vested or remainder interest in and to the above described real estate from the said defendant to the plaintiff.

IT IS FURTHER ordered that title to Savings Certificate No. SC8700104-1 and all funds on deposit thereunder with Sooner Federal Savings and Loan Association of Tulsa, Oklahoma, shall be and the same hereby is vested solely in the plaintiff, Lee R. West, as sole trustee for the use and benefit of the minor child of the parties, Boyd B. West, and that upon delivery of a copy of this decree to the said Sooner Federal Savings and Loan Association of Tulsa, Oklahoma, that they shall make all appropriate changes to show said ownership as being vested solely in the plaintiff as above set forth.

IT IS FURTHER ORDERED that the findings of this court as heretofore set forth are all incorporated into and made a part of the orders of this court the same as if set forth again herein in full.

/s/ Mermon H. Potter

MERMON H. POTTER
Associate District Judge

IN THE DISTRICT COURT OF OSAGE COUNTY, OKLAHOMA

LEE ROY WEST,	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	Case JFD-79-17
JEWEL WEST, a/k/a	)	
JEWELL A. WEST,	)	
Defendant,	)	

FINDINGS OF FACT AND CONCUSIONS OF LAW

1. The Court finds as a finding of fact that the cause comes on now before this Court on defendant's herein Motion to Vacate Decree of Divorce entered on March 7, 1979.

2. The Court further finds as a further finding of fact that evidence on the cause was heard before the Court by evidence adduced and supporting briefs filed herein.

3. The Court further finds as a finding of fact that the allegation of facts as alleged by plaintiff are apparently undisputed, as follows:

A. On or about August 18, 1979 defendant abandons plaintiff and minor child of the parties.

B. Plaintiff by and through counsel files petition for divorce against defendant on January 19, 1979.

C. Plaintiff in January 19, 1979, files an affidavit for publication alleging whereabouts of defendant is unknown in that plaintiff has no specific knowledge of an address of the defendant.

D. January 19, 26 and that of February 2, 1979, Notice by Publication properly published.

E. February 5, 1979, defendant in a correspondent with the plaintiff states that she has knowledge of the pending divorce litigation and further has contacted a local (Pawhuska) law firm and said firm has advised her of her legal rights. The letter of February 5, 1979, further states addresses where defendant receives her mail.

F. March 2, 1979, Notice by Publication Answer Date.

G. March 7, 1979, Decree of Divorce Granted by the District Court of Osage County, Oklahoma. No appearance or pleadings filed in behalf of defendant.

H. No contact with Court or Counsel for a period of thirty days since the heretofore mentioned letter of February 5, 1979.

I. Defendant by and through counsel file a Motion to Vacate on April 16, 1979.

4. The Court further finds as a finding of fact that after a careful examination of the facts and issues of law, the determinating issue is whether or not Title 12, O.S. 176 has been properly complied with, that is to say; . . . . . did defendant . . . . . "make it appear to the satisfaction of the Court, by affadavit, or other evidence that during the pending action he had no actual knowledge thereof in time to appear in Court and make his defense", . . .

5. The Court further finds as a finding of fact and conclusion that Section 176 of 12, Oklahoma Statutes, 1979 must be liberally construed. Warren Johnson vs. L.D. McDaniel, d/b/a Aetna Oil Co., 569 P.2d 977 (1977).

6. The Court further finds as a finding of fact and conclusion of law that defendant in her correspondence of February 5, 1979, alludes to in paragraph No. 2 that . . . "I

was also advised that if *the terms of the proceedings are not fair to me and meet with my approval that my lawyer will be prepared to file a countersuit insuring me of a fair settlement.* emphasis added. Indicating that defendant not only has actual knowledge of the proceedings but would indeed complain by and through a countersuit, here in all probability a Motion to Vacate, as a lapse of 71 (seventy-one) till a pleading in the form of Motion to Vacate was filed, if indeed the defendant was not satisfied with the "proceedings".

7. The Court further finds that a period of 45 (forty-five) days lapsed since the entry of the Decree of Divorce before defendant filed a pleading in the form of a Motion to Vacate.

8. The Court further finds as a finding of fact that Defendant's letter of February 5, 1979, was illustratus to the Court of the fact that defendant did possess full knowledge of the divorce proceedings at least (30) thirty days prior to entry of the Decree of Divorce, yet filed no appearance or pleading until 45 (forty-five) days after the Decree of Divorce was entered.

CONCLUSION

"..... the particular probative facts showing due diligence must be presented to the Court before judgment is rendered. These facts need not be set forth in the affidavit or in a verified pleading, but they must be adduced by proof presented at a hearing to be conducted before entry of judgment. The trial judge shall not approve publication process effected in any case unless he is satisfied from the evidence presented that plaintiff has met the requisite standard of due diligence." Bomford vs. Socony Mobil Oil

Co., Okl. 440 P.2d, 713, 720 (1968)... and whether or not the applicant (*to open default judgment/Motion to Vacate*) has satisfactorily made it appear to the Court, by affidavits and or other evidence, that during the pendency of the action, the applicant had not actual notice thereof in time to appear in Court and present his defense. Gann vs. Gann 459 P.2d 605, 606, (1969). Trial Court emphasis.

Thus premised upon the foregoing findings of fact and conclusions of law, the Court concludes that plaintiff herein has met and complied with the dictates of 12 O.S. 170.6 and that of the requisite standard of due diligence as evidence by Affidavit for Publication, Notice by Publication, Proof of Publication, transcribed proceedings of March 7, 1979, all exhibits admitted, and finding of the Trial Court thereafter entered on March 7, 1979, in Case No. JFD-79-17, West vs. West.

The Court further concludes that the defendant herein has failed to overcome the burden of showing she had no actual knowledge of the proceedings in time to defend the same.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendants' Motion to Vacate is respectfully overruled.

BE IT SO ORDERED.

ASSOCIATE DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE: Assignment of Judges and Appointment of Lawyers to a Temporary Division of the Court of Appeals Convened by Order of the Supreme Court and Assignment of Cases to that Division.

ORDER

Pursuant to Art. VII, § 1, Okla. Const. and 20 O.S. 1981, § 30.14 the following named judges and lawyers are hereby assigned and/or appointed to Temporary Division No. 63, of the Court of Appeals, State of Oklahoma:

Bill Settle, P. O. Box 1368, Muskogee, OK 74401
R. Forney Sandlin, P. O. Box 1934, Muskogee, OK 74401
Andrew Wilcoxen, P. O. Box 357,Muskogee, OK 74401
The following cases are assigned to the division:
Case No. 55,032
& Style Taylor v. Rust

Case No. 55,039
& Style Chemco Products, Inc. v. Moley Produce Co., Inc.

Case No. 55,153
& Style West v. Jewell a/k/a West

It is ordered that the Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court, published in Title 12, Oklahoma Statutes, Chapter 15, Appendix 3, as amended by Supreme Court Orders dated

September 3, 1976 and June 22, 1979, are to be followed until further order of this Court.

It is further ordered that until the Court of Appeals has made final disposition of any assigned case, any and all Motions, Petitions for Rehearing, etc., must be filed with the Clerk of the Court of Appeals, Room 104, State Capitol Building, Oklahoma City, Oklahoma, 73105.

DONE BY ORDER OF THE SUPREME COURT this 13th day of October, 1981.

_____

CHIEF JUSTICE

TEMPORARY DIVISION NO. 63, OF THE COURT OF APPEALS, STATE OF OKLAHOMA.

LEE ROY WEST,	)	
	)	
Appellee,	)	
	)	
vs.	)	No. 55153
	)	
JEWEL WEST, a/k/a JEWELL A. WEST,	)	
	)	
	)	
Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY; MERMAN H. POTTER, JUDGE.

Action by Jewel West a/k/a Jewell A. West against Lee Roy West to vacate judgment of Decree of Divorce obtained by publication. The trial court denied the motion to vacate and the defendant-appellant appeals. Affirmed.

Kane, Kane, Wilson & Mattingly, by W. Robert Wilson, Pawhuska, Oklahoma, for Appellee.

Heskett, Heskett, Daniel & Esser, by Rick Esser, Pawhuska, Oklahoma, for appellant.

SETTLE, BILL J. The facts of this matter are not in dispute. The appellant on or about the 18th day of August, 1978, left the home of the parties where they had resided as husband and wife. The parties were married on September 28, 1962 and had one son who, at the time of the hearing of this matter, was fifteen (15) years of age. During the period

of time from August 18, 1978 up to and including January 16, 1979, the appellee did not know the whereabouts of the appellant. During that period of time the son did receive a post card from the appellant postmarked from the State of California. The appellee contacted a cousin in the State of California sometime during the month of either November or December, 1978 and learned that his wife, the appellant, had been to the home of the cousin but that the cousin did not know where she, the appellant, was at the time the appellee made inquiry. The appellee filed a petition for divorce from the appellant on January 16, 1979. Plaintiff further filed an affidavit to obtain service by publication on January 16, 1979, stating among other things, "the defendant abandoned and removed herself from the residence of the parties on or about August 18, 1978, and that since that date the plaintiff has had no knowledge as to her whereabouts although he had some information that she may have at one time been located in the State of California but that he had no specific address and no knowledge as to her whereabouts. Affiant further states that he has made diligent inquiry with her friends and relatives and all sources available to determine her location or whereabouts but that the said defendant has purposely concealed her whereabouts from the plaintiff since her departure in August of 1978. . ." The record further reflects that during the period from August 1978 to January 16, 1979, the appellee had conversations with the parents of the appellant trying to learn her whereabouts but was unsuccessful. The record reflects the first notice by publication was made on the 19th day of January, 1979, with the last notice having run on the 2nd day of February, 1979. There was a notice also on the 26th day of January, 1979. There is no contention the publication notice is improper except that the appellant did not have actual notice.

The record further reflects the appellant wrote the appellee by letter dated January 26, 1979. The appellee testified the letter was received on January 27, 1979. The letter discusses the reasons the appellant left home, discusses divorce and arrives at the conclusion the appellee should file for divorce. The appellant enclosed in the said letter an address where she could receive return mail. She stated in said letter if it was mailed to said address she would get it some time; that they see these people now and then to pick up the mail but have not told them where they were staying because they did not want the people to become involved. The record reflects a second letter mailed by the appellant dated February 5, 1979 and received by the appellee. The letter starts out as follows, "Lee, In regard to the notice in the newspaper that you have filed for divorce — I want you to know that I have contacted a law firm in Pawhuska and they advised me of my legal rights. They told me I should give you my mailing address so that I can receive the necessary papers." The appellant then give the same address as previously given in the letter dated January 26, 1979. The appellant went on to state in the letter that she was advised if the terms of the proceedings were not fair to her and meet her approval that her lawyer will prepare a counter suit insuring her of a fair settlement. She further went on to state she was expecting to hear from the appellee concerning this matter.

The appellee did not respond to the letters of the appellant and appeared before the Honorable Mermon H. Potter on the 7th day of March, 1979. The court took testimony and the appellee testified the appellant left on August 18, 1978 and he did not hear from her or know of her whereabouts until he received a letter on January 27, 1979. The appellee testified he received another letter dated February 5, 1979.

Appellee testified he had no knowledge of the whereabouts of the appellant at the time he signed the affidavit for notice by publication dated January 19, 1979. Following testimony concerning the property acquired by the parties and testimony regarding the child, the court approved the notice by publication, granted the divorce and awarded certain of the property to the appellee and certain of the property to the appellant. Custody of the minor son was placed with the appellee. The decree of divorce was filed March 7, 1979.

The appellant made her initial appearance in this matter on April 16, 1979 by filing a Motion to Vacate the Judgment of Decree of Divorce alleging she had no actual knowledge or notice of the pendency of the divorce action until March 27, 1979 as she had been absent from the state since August of 1978. An Answer and Cross-Petition was also filed the same date. The appellant filed an Amended Motion to Vacate Judgement of Decree of Divorce on May 21, 1979 additionally alleging that she had been informed by her mother that some kind of notice was in the newspaper and upon learning of the same consulted a Pawhuska attorney, Bruce Gambill, who advised her the appellee was required to give notice by mailing and that the appellant thereafter wrote the plaintiff sending him her address. The appellant further alleged her failure to defend was without fault or latches on her part.

A hearing was held in this matter before the Honorable Mermon H. Potter on July 7, 1979. After a hearing the Court allowed each side to submit briefs. This was done although several months passed before the briefs were filed. Thereafter the court issued findings of fact and conclusions of law. The Court found the appellant had actual notice of the proceedings pursuant to Title 12, O.S.A. 176 and overruled the Motion to Vacate.

The dispositive issue herein centers around the issue of whether or not the appellant had actual notice of the proceedings in time to appear in court and make her defense. The above quoted statute governs proceedings to opening a judgment after default on service by publication. The statute in part states "Before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit or other evidence, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense. . ." The appellant did not, as required by the statute, make it appear to the satisfaction of the court that she had no actual notice of the proceedings in time to appear in court and present her defense. The facts of this matter as affirmatively shown in the letter of February 5, 1979, produced as plaintiff's exhibit No. 1 at the hearing on July 7, 1979, specifically recites the appellant has notice of the publication in the newspaper that the appellee had filed for divorce.

The leading Oklahoma case on service by publication is *Bomford v. Socony Mobile Oil Co.*, 440 P2d 713. This case sets forth the rule that a court cannot obtain jurisdiction over a party unless a method of notification is employed which is reasonably calculated to give him knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction and an opportunity to be heard. The method of notice by publication in the West case was proper in all respects and so held by the trial court. Since the intent or purpose is to give the party being sued knowledge or notice in time to respond to said suit, said purpose was achieved in this case as the appellant in her letter dated February 5, 1979 to

the appellee acknowledged the fact that the newspaper carried a notice that he had filed against her for divorce, she even contacted legal counsel to ascertain her rights of the matter. Therefore the prerequisites of *Bomford v. Socony Mobile Oil Co.*, supra, were met. Although the appellant states in her Motion to Vacate the Judgment of Decree of Divorce she did not have actual notice of the divorce action until March 27, 1979, her letter of February 5, 1979 states otherwise. The appellant therefore failed to sustain the burden of proof on the issue of actual notice and therefore the default judgment rendered against her in the divorce should not be reopened so that the appellant might be let in to defend. *Gann v. Gann,* 459 P2d 605.

The appellant cites several cases to support the contention that the appellee knew her whereabouts and should therefore have obtained personal service upon the appellant. However, all of these cases refer to instances where the whereabouts of the opposing party were known prior to the filing of the petition or instigation of the proceedings. In this case, the whereabouts of the appellant were not known to the appellee until after the notice by publication had run a second time and it was further found by the court that the appellee did not know the whereabouts of the appellant at the time the affidavit for notice by publication was filed. The cases are theefore distinguishable from the facts in this case.

It has long been the law in the State of Oklahoma that where a person has actual knowledge of facts sufficient to put a prudent man on inquiry, he has "notice" of everything which such inquiry would disclose. The appellant knew the appellee had filed for divorce at least by the 5th of February, 1979. She even contacted an attorney to determine her rights in the matter. Simple inquiry or investigation would have disclosed that the appellee was asking for all real and

personal property acquired during the marriage; that he was asking for custody of the minor child and that she had until the 2nd day of March, 1979 to make an appearance in said case. Thus, the appellant knew the divorce had been filed and was pending at least twenty six days before the answer date and thus had actual notice of facts which if investigated allowed her to enter the case and defend. *Detrick, et al. v. Kitchens,* 86 P2d 998; *Hildebrand v. Harrison,* 361 P2d 498; *Leche v. Ponca City Production Credit Assoc.,* 478 P2d 347 and *Palmer v. Crews Lumber Co.,* 510 P2d 269.

The judgment is affirmed.

Wilcoxen, Andrew, P.J. and Sandlin, R. Forney, J., concur.

TEMPORARY DIVISION NO. 63, OF THE
COURT OF APPEALS,
STATE OF OKLAHOMA.

LEE ROY WEST,	)	
	)	
Appellee,	)	
	)	
vs.	)	No. 55153
	)	
JEWEL WEST, a/k/a JEWELL A. WEST,	)	
	)	
	)	
Appellant.	)	

ORDER

The application of the Appellant for re-hearing and motion for oral argument having been considered by this Court is hereby denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Application for Re-hearing and the motion for oral argument should be and the same is hereby denied.

/s/ Andrew Wilcoxen

Andrew Wilcoxen, Chief Judge

/s/ Forney Sandlin

Forney Sandlin, Judge

/s/ Bill Settle

Bill Settle, Judge

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, October 13, 1982

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

55,153 Lee Roy West v. Jewel West a/k/a Jewell A. West.
Certiorari denied.

CHIEF JUSTICE